

# DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548

Knox  
25703

FILE: B-211832

DATE: July 11, 1983

MATTER OF: The E. A. Kinsey Company

## DIGEST:

1. Where protester's descriptive literature submitted with its bid in response to solicitation for brand name or equal product shows that protester's "equal" product fails to conform to the salient characteristics listed in the solicitation, the bid was properly rejected as nonresponsive.
2. Contention that specification for brand name or equal product unduly restricted competition will not be considered since it involves an alleged defect apparent from the face of the solicitation and the protest was not filed prior to bid opening as required by Bid Protest Procedures.

The E. A. Kinsey Company protests the rejection of its bid in response to invitation for bids (IFB) No. F33601-83-BA034 issued by Wright-Patterson Air Force Base for a vertical machining center. Kinsey's bid was rejected because the machine it offered did not conform to all the salient characteristics listed in the brand name or equal clause of the solicitation. Kinsey contends that its machine meets or exceeds the IFB's requirements in most respects and is capable of doing the same job at a lesser cost than the brand name machine. Kinsey also contends that by specifying a brand name or equal machine the solicitation unduly restricted competition. For the reasons that follow, we summarily deny the protest in part and dismiss it in part.

The IFB solicited bids to provide a vertical machining center, "Monarch Cortland P/N VMC-75 or equal" and it listed salient characteristics which any "equal" machine would have to meet. The solicitation contained the standard brand name or equal clause stating that any bids

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offering "equal" products would be considered for award if they fully met the salient characteristics contained in the IFB. Kinsey submitted a bid offering a Kearney & Trecker Milwaukee Series VB-4 Machining Center. It also included a "Conformance Statement" with its bid. This statement specifically indicated that the Milwaukee Machining Center failed to conform to a number of the stated salient characteristics. For example, the solicitation stated that the machine must have an automatic lubrication system. The statement with the protester's bid indicated that the proposed machine's ball tracks had to be manually greased.

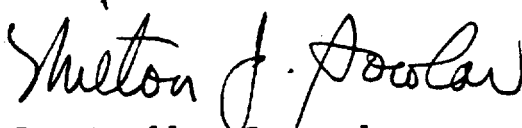
When a brand name or equal purchase description is used, it is incumbent upon the bidder who offers an "equal" product to establish that its product will meet the salient characteristics of the brand name product. Where, as here, however, it is clear from the literature submitted with a bid that the offered item does not conform to the salient characteristics of the brand name product, the bid must be rejected as nonresponsive. Shepard Group, B-203417, December 15, 1981, 81-2 CPD 473. Since Kinsey's "Conformance Statement" clearly shows that the Milwaukee machine it proposed does not conform to the salient characteristics listed in the solicitation, its bid was properly rejected as nonresponsive. Kinsey's protest on this point is summarily denied.

Kinsey also contends that the IFB's specifications unduly restricted competition in that they were "written around a specific machine." Kinsey asserts that prior to bid opening it complained to the agency that the specifications were restrictive in that they were based on a particular product. Kinsey further states that it was informed the specifications could not be changed, but that it could "take exception to any of the conformance statements." Based on this statement Kinsey filed no protest either with the agency or our Office until after bid opening.

We view this contention as untimely. A protest of alleged specification deficiencies must be filed prior to bid opening. 4 C.F.R. § 21.2(b)(1) (1983). We do not believe Kinsey properly could rely on the alleged statement about taking exception to the specifications to avoid protesting the specifications prior to bid opening. First,

the alleged statement is clearly contrary to the solicitation itself, which states that bids must conform to all the salient characteristics. Second, while Kinsey called the individual identified in the solicitation as the person to contact, paragraph 3 of Standard Form 33A (page 28 of the solicitation) explicitly warned bidders that any oral instructions or explanations concerning the solicitation would not be binding. Therefore, Kinsey should not have relied on the alleged oral advice and, if it wanted to complain about the specifications, it should have done so prior to bid opening. Kinsey's protest was filed well after bid opening; therefore, it is untimely on this point and we will not consider it. We note, however, that since this is a brand name or equal procurement, the purchase description necessarily had to be based on the brand name product, and that the protester has not indicated in what specific respects the purchase description improperly limited competition.

The protest is summarily denied in part and dismissed in part.

*for*   
Comptroller General  
of the United States